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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-357

ROBERT R. WILLIAMS, *et al.*,

Appellants,

v.

LEILA G. BROWN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Did the at-large system for electing the Mobile school board violate section 2 of the 1965 Voting Rights Act?

2. Should this Court overturn the concurrent findings of fact of the two courts below that the at-large system for electing the Mobile school board is maintained and operated for the purpose of discriminating against black voters?

3. Should this Court overturn the concurrent findings of fact of the two courts below that the at-large election system for electing the Mobile school board operates "to minimize or cancel out the voting strength" of blacks in violation of White v. Regester, 412 U.S. 755 (1973), and Whitcomb v. Chavis, 403 U.S. 124 (1971)?

4. Did the at-large system for electing the Mobile school board violate the Fifteenth Amendment?[1/]

1/ In their Jurisdictional Statement appellants presented a question regarding the remedy ordered by the district court. As was more fully set out in their Application for Stay, pp. 5-6, appellants complained because the single-member district elections were to be phased in over several years, rather than all beginning in 1978. As was noted by the district judge, the phasing in of single-member district elections had been sought by the appellants in the district court and defended by them in the court of appeals. The district court opinion of November 20, 1978, is set out in the Appendix to this brief, pp. App. 1a-19a; see App. 11a-12a. Appellants have apparently abandoned this issue in their brief.

STATEMENT

The complaint in this action was filed on June 9, 1975, alleging that the at-large system for electing the Mobile County Board of School Commissioners violated the Fourteenth and Fifteenth Amendments and section 2 of the 1965 Voting Rights Act. J.S. 75a. On October 10, 1975, the Alabama Legislature adopted an act providing for the use of single-member districts in the election of the Mobile school board. The defendant school commissioners then asked that the action as against them be dismissed as moot, and the district court did so on November 21, 1975.

On February 5, 1976, the school commissioners brought a state court action challenging on state constitutional grounds the new single-member district plan. They named as defendants only the same election officials who were their co-defendants in the federal action, and those election officials declined to defend the validity of the single-member district plan. The state court ruled for the school board and invalidated the single-member district plan on February 17, 1976.

On March 8, 1976, the federal district court granted plaintiffs' motion to rejoin the school commissioners in this action. The commissioners declined to file an answer until July 12, 1976, and filed unsuccessful motions to postpone the trial on July 6, 1976, July 12, 1976, September 2, 1976, and September 9, 1976. The action was tried on Septemer 9-17, 1976. On December 9, 1976, the district court held that the at-large system was unconstitutional because it impermissibly nullified the votes of black voters in Mobile and because the system had been maintained by the Legislature with "a present purpose to dilute the black vote". J.S. 37b; A. 34a. The court of appeals affirmed in a per curiam opinion on July 2, 1978. J. S. 1a-2a; A. 1a-2a. Probable jurisdiction was noted on October 30, 1978.

On September 5, 1978, pursuant to the single-member district plan ordered into effect by the district court, black candidates won the primary elections in two of those districts. On October, 1978, Mr. Justice Powell entered an order staying the holding of the general elections in those districts, 47 U.S.L.W. 3314, but on October

31, 1978, Justice Powell vacated that stay on the ground, inter alia, that the appel lants had failed to disclose that the general elections were uncontested. 47 U.S.L.W. 3324.

On October 11, 1978, the outgoing all-white commissioners voted to impose on the incoming board a requirement that no existing school policy could be changed except by a vote of four to one. Since the new board has three whites and two black members, the effect of this rule was to guarantee that no policy could be changed without the approval of a majority of the white commissioners. On November 24, 1978, the district court invalidated this new rule, holding that it was intended to disenfranchise the newly elected black school commissioners and to frustrate the court's previous orders.

SUMMARY OF ARGUMENT

I. Section 2 of the 1965 Voting Rights Act prohibits the use of election practices which "deny or abridge the right . . . to vote on account of race or color." This should be construed in pari materia with section 5 of that Act,

which forbids certain jurisdictions to use new election practices which will have the "purpose . . . or . . . effect" of so denying or abridging the right to vote. Both sections are concerned with the same type of denial or abridgement; section 5 merely establishes special procedures for reviewing new practices in particular states and subdivisions.

The meaning of the Act as applied to districting plans is well established. Blacks cannot be subjected to a districting system which would "nullify their ability to elect the candidate of their choice." Allen v. Board of Elections, 393 U.S. 544, 569 (1969). The courts below correctly found that Mobile's at-large election system operated in just that manner.

II. The district court found that the at-large system has been retained by Alabama for the purpose of diluting black votes. The record before the district court included uncontradicted testimony by members of the state legislature that hostility to the election of black local officials is a paramount consideration in the opposition to legislation to alter election plans from

at-large to single-member districts. There is a long history of intentional discrimination by Alabama officials against black voters, and at-large plans adopted by the legislature for electing the state House and officials of other cities have been invalidated by other court decisions as racially motivated.

The record also showed, and the district judge found, that state officials had sought to interfere with any prompt judicial resolution of this case by procuring the introduction or passage of deliberately defective state legislation purporting to create single-member districts. In 1975 the defendants obtained dismissal of this action on the ground that it had been mooted by the adoption of such a legislative plan and then promptly attacked the validity of that plan in an undefended state court action. In 1976, after being rejoined as parties, the defendants procured the introduction in the Legislature of a second single-member district bill, and repeatedly asked that this case be stayed or dismissed because of the pendency of this second bill. The defendants insisted in support of these motions that the bill was valid, but after their motions were rejected

they conceded that they actually believed that the bill would have violated state constitutional requirements. This palpable bad faith on the part of the board members, who by their own admission exercised effective control of the Legislature's decisions, supported the district court's conclusion that the failure of the Legislature to enact a valid single-member district plan was racially motivated.

III.A. In our brief in City of Mobile v. Bolden, No. 78-1844, we set out our analysis of White v. Regester, 412 U.S. 755 (1973), showing that White precludes the use of a multi-member district system which so maximizes the weight of a bloc-voting white majority that the votes and electoral preferences of the non-white minority are consistently nullified. We there urge that such a system is the functional equivalent of one in which white voters reside in a district with an excess number of representatives and black voters live in a district with no representatives at all.

White bloc voting is not, as appellants suggest, an "unfortunate practice" of no constitutional significance, but the keystone of a White v. Regester violation. Here white bloc voting has its roots in a century of racial discrimination openly practiced and advocated by Alabama public officials. In Mobile that bloc voting is deliberately inflamed and manipulated by white candidates, many of them incumbent public officials. Campaign leaflets and advertisements pointedly display photographs of black opponents and attack white opponents for having received the votes of blacks.

B. The courts below correctly found that Mobile's at-large election system operates to effectively disenfranchise black voters. The evidence showed, and the district court found, that whites vote as a bloc against black candidates or white candidates who are supported by black voters, that no black has ever won any at-large election in Mobile, that no black candidate could do so under the present system, and that the all-white school board had discriminated against its black constituents.

Appellants contest only the district court's finding that the school board was unresponsive to the interests of the black community. They do not deny that the board members intransigently refused to desegregate the de jure school system until threatened with personal fines of $1,000 a day, but urge that since then the attitude of the board has changed. The district court, however, found no such change, and in more recent years the board has been subjected to federal court decrees for improperly hiring and assigning faculty and staff on the basis of race, for expelling large numbers of black students, and for trying to disenfranchise newly elected black members of the board.

The record in this case contains the same evidence deemed sufficient to establish a constitutional violation in White. The district court's finding of such a violation, resting on "a blend of history and an intensely local appraisal of the design and impact of the [Mobile] multimember district in the light of past and present reality, political and otherwise", 412 U.S. at 769-70, should be upheld.

IV. The Fifteenth Amendment prohibits the use of election systems "which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." Lane v. Wilson, 307 U. S. 268, 275 (1939). Lane does not require any showing that such barriers are racially motivated. In view of the fact that the Fifteenth Amendment singles out the franchise for special protection, a broader standard should be applied to election laws burdening blacks than under the general prohibition against racial classifications contained in the Fourteenth Amendment.

ARGUMENT

I. THE AT-LARGE SYSTEM FOR ELECTING THE MOBILE SCHOOL BOARD VIOLATES SECTION 2 OF THE 1965 VOTING RIGHTS ACT

The complaint in this action alleges that the at-large system for electing the Mobile School Board violates section 2 of the 1965 Voting Rights Act. A. 75a. Section 2, codified in 42 U.S.C. §1973, provides:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color....

The district court noted the existence of this statutory claim, J.S. 2b-3b, but neither court below decided it. The practice of this Court, however, is to avoid the decision of constitutional issues if it is possible to resolve a case on non-constitutional grounds. Wood v. Strickland, 420 U.S. 308, 314 (1975); Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944).

The district court correctly held that section 2 establishes a private cause of action. A. 83a and n.2. Section 3 of the Voting Rights Act, which originally authorized certain special remedies[2/] in actions brought by the Attorney General under statutes protecting the right to vote, was amended in 1975 to make those remedies available as well in actions under any

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2/ These remedies include the appointment of federal examiners to register voters, the suspension of "tests or devices", and judicial or administrative pre-clearance of new voting laws.

federal voting statute brought by an "aggrieved person". 42 U.S.C. §1973a. The purpose of that amendment was to "allow a court, in a suit brought by a private party, to grant the Act's special remedies". S. Rep. No. 94-295, 94th Cong., 1st Sess., pp. 39-40, 49. The proponents of this amendment made it clear that they understood such a private action was available under section 2, and that section 3 remedies could thus be provided in private section 2 actions.[3/]

In our brief in City of Mobile v. Bolden, No. 77-1844, we set out at length our contention that section 2 prohibits election practices with certain discriminatory effects, including an at-large election system that "create[s] or enhance[s] the power of the white majority to exclude Negroes totally from participating in the governing of [a school board] through membership on the [board]". See City of Richmond v.

3/ Congressman Drinan, for example, noted that private actions could be "based ... upon statutes pursuant to [the Fourteenth and Fifteenth Amendments], such as 42 U.S.C. §1971, 1973, 1983." 121 Cong. Rec. H4734 (Daily ed. June 2, 1975).

United States, 422 U.S. 358, 370 (1975); Brief for Appellees, No. 77-1844, pp. 11-17. We there explain that the permanent prohibitions of section 2 and the temporary pre-clearance procedures of section 5 of the Voting Rights Act establish the same substantive standard but different procedures. As Senator Scott of Virginia noted:

> Substantially all the rights that are in the temporary legislation are in the permanent legislation of the Voting Rights Act. The principal difference refers to the burden of proof. Under the permanent provision of the law, the Government must prove its case. Under the temporary provision of the law there is a presumption of wrongdoing that has to be overcome by the state covered by the temporary provisions.4/

The record and findings in this case, which we set out in detail infra at pp. 43-48, demonstrate that the at-large system for electing the Mobile school board had just such an impact. The system placed 103,000 blacks in a district with 214,000 whites, J.S. 6b, enabling the whites

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4/ 121 Cong. Rec. S135499 (Daily ed. July 24, 1975); see also id. S13601 (remarks of Sen. Scott) (section 2 is the permanent provision referred to), S13376 (remarks of Sen. Brock) (section 5 establishes a different "procedure" than exists in non-covered jurisdictions).

by bloc voting to exclude from the school board not only blacks but even whites who had revealed an interest in serving the needs of the black community. This evidence was sufficient to meet plaintiffs' burden of establishing a violation of section 2 of the Voting Rights Act.

II. THE AT-LARGE SYSTEM FOR ELECTING THE MOBILE SCHOOL BOARD IS MAINTAINED AND OPERATED FOR THE PURPOSE OF DISCRIMINATING ON THE BASIS OF RACE

Although the Jurisdictional Statement and Brief for Appellants deal primarily with the application of the dilution rule of White v. Regester, 412 U.S. 755 (1973), the at-large election system was also invalidated below based on a finding of discriminatory intent. The district court found "a present purpose to dilute the black vote....", J.S. 37b; A. 34a (emphasis added), and the court of appeals upheld the district court's findings as "not clearly erroneous". J.S. 2a; A. 2a. The constitutional prohibition against such racially motivated laws is well established, and its application presents a largely factual issue. This Court does not ordinarily "undertake to review concurrent find-

ings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949). Appellees maintain that no such unusual circumstances are present here.

The method for electing each school board in Alabama is fixed by state legislation. That method varies in a crazy-quilt pattern across the state; at least 11 different systems are presently in use.[5/] The Legislature frequently alters the method of electing the boards in particular counties; from 1975-1977, for example,

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5/ These include (1) five board members elected at-large with no residency requirement, as in Mobile County prior to this action, cf. Ala. Code §16-8-1 (1975); (2) five members elected at-large, but excluding residents of areas with independent boards of education, see e.g., Ala. Acts, 1977 Reg. Sess., No. 355 (Houston County); (3) five members elected at-large, but only one may live within the jurisdiction of an independent city board, see e.g., Ala. Acts, 75 Reg. Sess., No. 645 (Jefferson County); (4) seven at-large members, at least two of whom must not reside in a municipality, see e.g., Ala. Acts, 1939 Reg. Sess., No. 222 (Montgomery County); (5) seven at-large members from residency district, see e.g., Ala. Acts, 1971 Reg. Sess., No. 60 (Etowah County); (6) five at-large members from

the system was changed in five counties.[6/] The Mobile system, which predates the adoption of the 1965 Voting Rights Act,[7/] provides for the at-large election of all members of the board. Appellees contend, and the district court found, that Mobile's system is being maintained because of a "present purpose" to discriminate against

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5/ Cont'd

residency districts (excluding cities with independent boards), see e.g., Ala. Acts, 1973 Reg. Sess., No. 316 (Blount County); (7) one at-large plus four at-large from residency districts, see e.g., Ala. Acts, 1971 Reg. Sess., No. 2268 (Autauga County); (8) one at-large plus four single-member districts, see e.g., Ala. Acts, 1977 Reg. Sess., No. 254 (Chambers County); (9) seven members from single-member districts, see e.g., Ala. Acts, 1976 Reg. Sess., No. 380 (Morgan County); (10) five members from single-member districts, see e.g., Ala. Acts, 1936 Reg. Sess., No. 91 (Marion County); (11) four members from single-member districts, see e.g., Ala. Acts, 1967 Reg. Sess., No. 298 (Cleburne County).

6/ Jefferson, Chambers, Morgan, Houston, Geneva.

7/ There is some dispute as to what legislation established the present system. See J. S. 27b, A. 26a. In our view it is not necessary to determine when the system was created, since the district court correctly found it is being maintained for a discriminatory purpose.

black voters and to prevent the election of black members of the board. The record fully supports the findings below.

The district court found that race is a paramount consideration when the Legislature passes on any proposal to alter the method of electing state or local officials:

> The evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected. These factors prevented any effective redistricting which would result in any benefit to the black voters passing until the State was redistricted by a federal court order. J.S. 35b-36b, A. 33a.

This direct evidence of racial motivation, based on the uncontradicted testimony of members of the Legislature,[8/] was "highly relevant". Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977).

The district court noted that the undisputed impact of the at-large system in Mobile was to preclude the election of any black to the school

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8/ A. 233a-234a, 267a-269a, 309a-311a, 405a-406a.

board.[9/] There was direct evidence that this discriminatory impact of at-large systems was well known to the Legislature[10/] and to the members of the Mobile school board.[11/] Such proof that the system bore "more heavily on one race than another" was also a strong indication of discriminatory intent. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 266.

The district court properly relied as well on the long history of discrimination in Alabama against black voters.[12/] We have described that

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9/ J.S. 10b, 12b, 13b, 40b; A. 12a, 13a, 14a, 15a, 37a.

10/ See n.44, infra.

11/ Commissioner Alexander testified:

> A [I]n my opinion, a black could not be elected at this time on a county-wide basis.
>
> Q. Have any of the other school commissioners agreed with that position on the record?
>
> A. I would say that they generally agree with that, yes sir.

A. 372a.

12/ J.S. 9b, 19-21b, 43b; A. 11a, 20a-21a, 39a.

history at length in our brief in City of Mobile v. Bolden. Brief for Appellees, No. 77-1844, pp. 25-33. The use of at-large election systems to dilute black votes has been a major discriminatory tactic in recent years in Alabama. Id. pp. 31-32. This "series of official actions taken for invidious purposes" was also relevant under Arlington Heights, 429 U.S. at 267.

This evidence was compounded by two incidents which led the district judge to conclude that the defendants had acted with unclean hands.

The first such scheme involved the "Kennedy Bill",[13] a measure that had originally been proposed prior to the commencement of this action. A. 36a. The Kennedy Bill mandated the use of single-member district elections for the Mobile school board. The members of the board offered to support the Kennedy Bill provided that a single seemingly innocuous change was made.[14] At

13/ H.1243, Ala. Reg. Sess. (1975).

14/ A. 234a-35a, 379a-382a.

the board's insistence the dates on which the new single-member districts were to be phased in were altered, and with that modification the bill was passed and signed into law on October 10, 1975.[15] Although they were in close contact with the Legislature, the board members never expressed any doubts about the validity of the Kennedy Bill.[16] Shortly after the bill became law the defendant board members requested that the instant action be dismissed as against them[17] on the grounds it was moot.[18] The plaintiffs acquiesced in this request, and the school board claims were dismissed without prejudice on November 21, 1975. A. 80a.

On February 7, 1976, less than two and a half months after the school commissioners had obtained dismissal of this federal action on the

15/ Ala. Acts, 1975 Reg. Sess., No. 1150.

16/ A. 384a-385a.

17/ The complaint also challenged the use of at-large elections to choose the County Commission. This aspect of the case remained unaffected.

18/ Tr. 865.

ground that the Kennedy Bill had enacted single-member districts, the same school board commissioners brought a state court action attacking the validity of the Kennedy Act. The state court action was not a meaningful adversary proceeding. The federal plaintiffs were not named as parties or served with the complaint. The only named defendants were the Sheriff, Circuit Clerk and Probate Judge of Mobile County, who were also defendants in the federal action.[19] Thus the state action was a proceeding between the federal defendants to determine the validity of the relief obtained by members of the federal plaintiff class through legislative action. The defendant Sheriff, Circuit Clerk and Probate Judge appeared in the state action but took no position on the merits;[20] the Alabama Attorney General who was

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19/ The complaint and judgment in the state court action, Board of School Commissioners of Mobile County, Alabama v. John L. Moore, Civil Action No. 96,204, are in the record in this case, annexed to plaintiffs' Motion to Add Parties Defendant. See A. 88a.

20/ Their Answer admitted all allegations of the Board's complaint except its conclusion that the single-member plan was invalid, and as to that

also served never appeared at all. A. 240a.

The gravamen of the school board's state court complaint was that the language of the Kennedy Act as finally adopted differed from the language of the Bill as originally advertised in Mobile. This was claimed to violate a state constitutional requirement that such "local laws" be advertised prior to passage. But the board objected to the very change in language which the board itself had demanded, the alteration of the dates for implementing single-member district elections.[21] The state court entered judgment in

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20/ Cont'd

conclusion asserted only that the "defendants are without sufficient knowledge to admit or deny the allegation...." Answer, p. 1. The state court defendants filed no other pleadings, briefs, or other papers.

21/ In support of its action the board filed an affidavit of George E. Stone, Jr., Director of Legal Services of the Mobile County School System, dated February 12, 1976. The affidavit asserted there was a "substantial difference of substance between the published notice and Act No. 1150 as enacted by the Legislature. The Bill of which notice by publication was given creates

favor of the school board holding the Kennedy Act invalid on February 17, 1976, twelve days after the state court action was commenced. None of the nominal defendants in that action appealed. J.S. 22b-23b; A. 23a.

On March 1, 1976, the federal plaintiffs moved to rejoin the school commissioners as defendants, a motion which the district judge promptly granted. A. 65a, 88a-89a. Although the commissioners were thus back in federal court, they had succeeded in delaying those proceedings

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21/ Cont'd

five geographic districts numbered one through five. It provides for the election of members of the Board from districts one, two and three in November 1976 to take office in January, 1977 and for election of members from districts four and five to be elected in November 1978 to take office in January 1979. Whereas, Act. No. 1150 as passed by the Legislature provides for the election of members from districts three and four in November 1976 to take office in January 1977, for the election of a member from district one in November, 1978 to take office in January 1979 and for election of members from districts two and five in 1980 to take office in January 1981. Thus, there is a substantial and material difference between the published notice of the bill that was to be introduced and Act No. 1150 as passed by the Legislature." P. 5.

by over three months, which was probably sufficient to assure that the case could not be decided prior to the 1976 school board elections. The defendants guaranteed that result by refusing to file an Answer until July 12, 1976, A. 95a-99a, 106a, 118a, and then filed four motions for continuances prior to the September 1976 trial. A. 92a, 100a, 144a, 166a.

Following their joinder as defendants, the school commissioners prepared a second bill. This new proposal was cast as a "general law of local application", a form of legislation which does not require any advertisement under the Alabama Constitution. The commissioners asked black Representative Gary Cooper to introduce this measure, but Cooper, suspicious of the board's motives, refused to do so. Tr. 400-01. On July 8, 1976, white Representative Nat Sonnier, acting for the defendants, introduced the bill. A. 101a-102a, 146a. Four days later the defendants moved to delay further proceedings in this action because of the pendency of the "Sonnier Bill"[22/]

22/ H.1060, Ala. Reg. Sess. (1976).

A. 100a. The defendants repeatedly insisted they favored the use of single-member districts, referred to the fatal defect of the Kennedy Act as "unfortunate",[23] and stated they were doing all they could to obtain enactment of the Sonnier Bill.[24] The requested continuances were denied.

In view of the misuse of the Kennedy Act by the school board, legislative proponents of single-member districting opposed the Sonnier Bill, fearful that it too was a contrivance to perpetuate the at-large system. Representative Cooper explained:

> I felt that it was a ploy being used by the Mobile County School Board so that they could come back and tell the Judge here in Mobile that we were trying to get a bill passed. Of course, we knew that if the bill passed . . . it could be challenged, and it would mean another two or three years before any result could come to this problem. A. 272a.

23/ A. 101a, 115a.

24/ A. 101a, 111a, 115a, 145a-146a, 168a, 172a-173a, 178a, 179a.

Representative Cooper expressed reservations about whether, in light of the special state constitutional status of the Mobile school board, it could be redistricted by a general law of local application. A. 238a-239a, 249a-251a. The defendants then made repeated motions to dismiss this action, claiming the plaintiffs did not have "clean hands" because the Sonnier Bill was being blocked by black legislators allegedly acting on behalf of the plaintiffs. A. 144a-148a, 168a-172a. These motions were denied.

In connection with these motions for continuances and dismissal, a question naturally arose about whether the Sonnier Bill would be valid under state law. Counsel for plaintiffs were concerned that it too was deliberately defective, and that the board would attack the legality of the Sonnier Bill, as it had the Kennedy Bill, once dismissal or delay of the federal action had been achieved. The defendants, however, insisted in their September 2, 1976, motion that the Sonnier Bill would meet "all constitutional standards", A. 148a, and offered proposed Findings of Fact and Conclusions of Law stating the bill was "constitutionally sound". J.S. 25b; A. 25a. Counsel for

the school board, at the September 9, 1976, hearing on the last motion for dismissal or continuance, unequivocally insisted that the Sonnier Bill "would have met all constitutional tests and requirements" and "would meet every Constitutional test". A. 171a, 173a. Once these motions were denied and the case went to trial, counsel for the board took precisely the opposite position. In urging that Mobile's at-large system was of long standing, counsel for the board contended it dated from a 1919 statute, not a more recent 1939 law, because the latter was a "general law of local application" and such laws could not constitutionally apply to Mobile. The district judge realized that the Sonnier Bill had also been a general law of local application, and counsel for defendants asserted that it too would have been invalid.

> THE COURT: So, if that is true an Act passed as a general Act ... would be unconstitutional?
>
> MR. PHILIPS: I think it would.
>
> THE COURT: So, the proposed Act this last time was, therefore, unconstitutional?
>
> MR. PHILIPS: I think it was.

> THE COURT: Okay.
>
> MR. PHILIPS: There never was any doubt in my mind about that.

A. 441a-442a (emphasis added). This was the same attorney who had represented at the beginning of trial that the Sonnier Bill was valid and thus justified dismissal of this action.

In the face of these inconsistent representations the district judge found that the defendants were acting with unclean hands; the board's tactics, he wrote, were similar to their "lack of cooperation and dilatory practices" in obstructing school desegregation. J.S. 26b; A. 26a. The district court later noted that the purpose of "the defendants' different positions on legislative proposals to provide for single-member district[s] . . . ha[s] been to delay and defeat their alleged support of the legislative actions".[25/] This palpable attempt to perpetrate yet another ruse on the federal court was of obvious importance in assessing the motives

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25/ Appendix to this brief, App. 12a-13a.

underlying the maintenance of the at-large system.[26/]

The state officials whose decisions produced the deliberately defective legislation of 1975 and 1976, and who controlled the Legislature's failure to enact single-member districts before or after that period, were the defendant school commissioners, and thus it is their motives which are critical. Under the "courtesy rule" in force in the Alabama legislature, responsibility for any legislation affecting only Mobile was left entirely in the hands of the Mobile County legislative delegation, J.S. 35b; A. 32a-33a. In this instance the delegation was acting at the behest of the defendant school board members and the board itself insisted it could control the passage

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26/ A. 169a, 172a-173a. Regrettably such tactics did not end after the trial of this action. In this Court, for example, the appellants attacked the schedule for phasing in the use of single-member districts even though they had sought such a schedule in the district court and defended it in the court of appeals. App. 11a-12a. The appellants also sought to disenfranchise any new black members of the school board by requiring a vote of 4 to 1, and thus a majority of the white members, to alter any existing policy. App. 7a-9a, 13a-14a. "App." citations refer to the Appendix to this brief.

of school board redistricting legislation.[27/] For federal constitutional purposes the members of the Mobile school board are state officers as much as are the members of the state Legislature. The bad faith of either fatally taints any resulting legislation. Cf. Cooper v. Aaron, 358 U. S. 1 (1958).

The appellants do not question or address any of these findings. They attack the finding of purposeful discrimination on somewhat different grounds.

The only portion of the Brief for Appellants dealing directly with this issue asserts that the at-large system did not originate as a "device to discriminate". Brief for Appellants, pp. 60-61. But appellees' contention and the finding below are that the at-large system has been maintained in operation in order to disenfranchise blacks, and is thus tainted by "a

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27/ A. 148a, 172a-173a. Notwithstanding their repeated pretrial assertions of a desire to procure their own single-member disctrict plan in the Legislature, the defendants did not do so at the 1977 or 1978 sessions of the Legislature.

present purpose" to discriminate. J.S. 37b; A. 34a. If state officials continue a policy or practice for discriminatory reasons, that policy or practice is unconstitutional regardless of the motive which led to its original adoption. Arlington Heights itself recognized that a racially motivated decision to maintain the zoning classification of a particular lot would violate the Fourteenth Amendment regardless of the origin of that classification. 429 U.S. at 257-58, 268-71 n.17.

Appellants assert that "[p]laintiffs' challenge to the at-large manner of electing school board members was premised on the alleged effects of this system, not on its purpose". Brief for Appellants, p. 6. The complaint is phrased with sufficient breadth to encompass either claim. The defendants in the district court did not move for a more definite statement under Rule 12(e), F.R.C.P., and neither in this Court nor at any other stage in this proceeding have they suggested they were misled by the complaint. Plaintiffs' Proposed Pretrial Findings, filed several months prior to trial, made crystal clear that plaintiffs claimed the at-large system had a discriminatory motive; it asked the

trial court to find "that the State of Alabama, through its legislators and officers, has used the at-large system ... with an active motive or purpose to discriminate against the black citizens of Mobile",[28/] and that this was the "conscious legislative and political purpose in the maintenance of the current at-large election...."[29/] The district court expressly noted the existence of this claim. J.S. 5b; A. 8a.

Finally, appellants suggest that the court of appeals improperly equated proof of dilution under White v. Regester, 412 U.S. 755 (1973), and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), with proof of discriminatory purpose. Brief for Appellants, pp. 36-42. This argument is grounded on a somewhat novel approach to reviewing a court of appeals decision. Not a word in the Fifth Circuit decision in this case even discusses the relation of White and Zimmer to proof of purpose. Appellants rely entirely on the following passage. "See Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978)." Brief for Appel-

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28/ Plaintiffs' Proposed Pretrial Findings, p. 26.

29/ Id. p. 29.

lants, p. 37. They suggest that this incorporates by reference not only all the reasoning of Bolden, but also the reasoning of "the three other cases that the court of appeals consolidated with Bolden". The only extended discussion of the relation between White and Zimmer and intent is to be found, not in Bolden, but in one of those consolidated cases, Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), petition for cert. pending No. 78-492. Nevett, which was not cited or relied on by the panel below, holds only that "under proper circumstances" evidence sufficient to establish dilution might also be sufficient to establish a prima facie case of intentional discrimination. 571 F.2d at 223. What those circumstances might be Nevett did not, and this Court need not, decide. It seems somewhat far-fetched to read into the opinion below an error on an issue which it never discussed because it cited Bolden, which in turn cited Nevett, which in turn recognized but did not decide that issue. We suggest that the court of appeals cited Bolden merely as an illustration of another finding, based on similar direct and circumstantial evidence, of "a present purpose to dilute the black vote" resulting in

"intentional state legislative inaction". Bolden v. City of Mobile, 571 F.2d at 246.

This aspect of this case thus presents no legal issues of broad implication. It rests on a factual finding, of relevance to this case alone, that Alabama has chosen to maintain at-large elections for the Mobile school board, rather than use single-member districts, because of "a present purpose to dilute the black vote...." J.S. 37b; A. 34a. The record on which that finding was based contains precisely the sort of evidence contemplated by Arlington Heights: direct testimony about the motives of the Legislature, a widely known adverse impact on black voters and candidates, a long and closely related history of intentional discrimination, and palpable bad faith on the part of the white school commissioners who exercised effective control over whether and in what form a single-member plan would be adopted. The court of appeals correctly upheld the district court findings as not clearly erroneous, and the finding of discriminatory purpose should be upheld by this Court.

III. THE COURTS BELOW CORRECTLY APPLIED THE PRINCIPLES OF WHITE v. REGESTER AND WHITCOMB v. CHAVIS

A. The Legal Standard Established By White and Whitcomb

In our brief in City of Mobile v. Bolden we discuss at length the origin and rationale of the dilution rule of White v. Regester, 412 U.S. 755 (1973), and Whitcomb v. Chavis, 403 U.S. 124 (1971). We there urge that a plaintiff may prove a constitutional violation comparable to geographic malapportionment by demonstrating that the overall structure of a multi-member district system operates to so maximize the weight of a bloc voting white majority that the votes and electoral preferences of the non-white minority are consistently nullified. Brief for Appellees, No. 77-1844, pp. 37-53. That brief sets out in detail our arguments that proof of discriminatory motive is not necessary under White and Whitcomb, id., pp. 53-61, and that those decisions are not limited to cases of a white-dominated slating process. Id., pp. 45-48.

Appellants in the instant case urge that white bloc voting against black candidates and black interests is merely an "unfortunate practice" of no particular constitutional signifi-

cance, relying on the opinion of three members of this Court in United Jewish Organizations v. Carey, 430 U.S. 144 (1977). Brief for Appellants, p. 43. Prior decisions of this Court, however, make clear that white bloc voting is the keystone of a dilution case under White and Whitcomb.[30/] UJO expressly noted that it is only when voting "follow[s] racial lines" that a voter is injured by being placed in a district dominated by another race. 430 U.S. at 166, n.24. The opinion in UJO holds that under the circumstances of that case proof of bloc voting did not establish a cause of action. 430 U.S. at 166-67. But there white voters, who constituted 65% of the county population, were challenging a plan which left white majorities in 70% of the districts. The opinion held that the election of black candidates in the other 30% of the districts of because of black bloc voting would not violate the constitutional rights of whites "as long as whites in Kings County, as a group, were provided with fair representation." 430 U.S. at 166. That

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30/ See Brief for Appellees, No. 77-1844, pp. 40-45.

system was precisely the opposite of the system in the instant case, which provides the 35% black population with 0% of the representation.

This case, moreover, provides no occasion for examining all the varieties of voting patterns that might be characterized as "bloc voting". It concerns only the specific harsh realities of Mobile, Alabama. As we set out at length, infra, the record shows and the district court found that whites vote as a bloc not only against any black candidate regardless of qualification, but also against any white candidate who is known to have black support. See pp. 44-45, infra. This practice, far from fading away, has become increasingly virulent; the defendants' own expert concluded that white hostility to black voters, interests and candidates in Mobile had increased since 1960, and that "while the numbers of blacks voting in Mobile has increased sharply since 1960, the power of blacks to positively influence elections has decreased."[31/] Plaintiffs expressly

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31/ A. 502a; see also A. 472a, 500a.

alleged that the white bloc voting was the result of officially practiced and advocated racial discrimination by Alabama authorities, A. 127a, and the district judge apparently shared that view.[32/] The differing abilities of black candidates to win white votes in Mobile and Massachusetts have their roots in differences in past official policies and practices.

White bloc voting in Mobile, moreover, does not linger inexplicably; it is deliberately and expressly encouraged by white officials and candidates. The campaign advertisements reproduced at pages 523a to 536a of the Appendix, all used within the last decade, overtly seek to inflame racial passions. Not only do white candidates circulate leaflets which pointedly display photographs of their black opponents,[33/] but they also place photographs of blacks next to photographs of their white opponents to "illus-

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32/ "The racial polarization existing in the city and county elections has been discussed herein. The court finds that the existence of past discrimination has helped preclude the effective participation of blacks in the election system today in the at-large system of electing school commissioners." J.S. 21b; A. 21a.

33/ A. 403a-404a.

trate" the nature of the opponent's support. A. 523a, 533a, 536a. Cf. Anderson v. Martin, 375 U.S. 399 (1964). Whites are consistently attacked for receiving what is euphemistically described as "the bloc vote",[34/] and advertisements in runoff elections emphasize the support won by opponents in "predominantly black wards". A. 524a (emphasis in original).[35/] In the 1972 school board election, Homer Sessions, then an incumbent member of the school board and a defendant in this action, suggested his white opponent favored "racial amalgamation". A. 528a. Sessions' supporters circulated a leaflet, reprinted on the opposite page, denouncing that opponent for having "entertained blacks in her home" and having "been seen and photographed in company of black males." A. 523a. Candidates are entitled to attack their

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34/ A. 523a, 525a-526a, 531a, 534a.

35/ See also A. 523a, 525a-526a.

JOHN LeFLORE

GERRE KOFFLER

WHO WILL RUN YOUR SCHOOLS?

GERRE KOFFLER FACTS:

RUNNING FOR PLACE NO. 3, SCHOOL BOARD COMMISSION, MAY 30th.

1. SIGNED AGREEMENT WITH NAACP TO ACHIEVE TOTAL INTEGRATION WITH TOTAL BUSING.
2. VERY ACTIVE IN THE MILITANT ORGANIZATIONS ACT, NAACP, NOW, NON-PARTISAN VOTERS LEAGUE, LEAGUE OF WOMEN VOTERS.
3. HAS ENTERTAINED BLACKS IN HER HOME.
4. HAS BEEN SEEN AND PHOTOGRAPHED IN COMPANY OF BLACK MALES.
5. UNDER INSTRUCTION OF ALBERT J. FOLEY IN THE CIVIL RIGHTS SCHOOL CURRENTLY.
6. POLLED 92% OF BLACK VOTE IN MAY 2, PRIMARY.

	MAY 2 BLOCK VOTE			
WARDS	Koffler	Sessions	Langan	McConnell
3 STANTON ROAD	746	170	1,071	49
10 DAVIS AVE.	529	123	820	87
31 PLATEAU	270	22	282	10
32 TRINITY GARDENS	320	24	372	41

PLEASE VOTE MAY 30

OFFICIAL C. B. I. REPORT DATE LINED MOBILE, ALA.

opponents on any basis they may please, including that of race, but they are not entitled to have the state maximize the effectiveness of such racial tactics by means of at-large elections.

Appellants urge that different and less stringent dilution standards should be applied to at-large elections for a local government unit than for a state legislature. Brief for Appellants, pp. 64-69. This issue was never raised in the lower courts, and any opportunity to do so was abandoned long ago. Id., p. 64. We set out in our brief in City of Mobile v. Bolden our contention that White and Whitcomb are equally and fully applicable to local elections. Brief for Appellees, No. 77-1844, pp. 61-67.

Appellants suggest that there are particularly close and active relationships between the public and local elected officials. While that may be true in some towns, it is certainly not true in large urban areas. Mobile County, for example, with a population of 317,000, has a larger population than Alaska;[35/] 119 other

35/ In 1970 the population of Alaska was 304,000. Statistical Abstract, 1977, p. 11.

counties and 47 cities in the United States, are one larger than at least one state.[37/] The population of the Mobile at-large district is 10 times larger than an Alabama House district, 3 times larger than an Alabama Senate district, and larger than any single-member district used to elect legislators in almost any state in the country.[38/] The functions of local government bodies do vary widely, but some are certainly entirely legislative in nature. Even where those local bodies perform administrative functions as well, that hardly makes it less important that blacks have meaningful representation on the board or council involved.

B. The Application of White and Whitcomb To The Facts Of This Case

After an unusually detailed analysis of the evidence the district court concluded that:

37/ See United States Census, City County Data Book, 1972, pp. 800, 814.

38/ Of the 49 state senates and 50 state assemblies or houses, only the state senate districts in New York and California appear to exceed 300,000 in population.

> the at-large districts operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Whitcomb, 403 U.S. at 143, and Fortson [v. Dorsey, 379 U.S 433,] 439, and 'operates impermissibly to dilute the voting strength of an identifiable element of the voting population. Dallas [v. Reese, 421 U.S. 477,] 480. J.S. 45b-46b; A. 41a.

The court of appeals expressly upheld this conclusion. J.S. 2a; A. 2a. These findings, which are essentially factual in nature, are fully supported by the record and should be upheld by this Court.

The district court found that there was racially polarized voting in Mobile; whites voted as a bloc, not only against black candidates, but against "any white candidate with a favorable vote in the black wards, or identified with sponsoring particularized black needs".[39/] It noted that this "white backlash" against black support had led to the defeat of white candidates. The record fully supported this finding of white bloc voting

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39/ J.S. 10b, 11b, 12b; A. 12a, 13a, 14a.

against both black candidates[40/] and white candidates connected with black voters or interests.[41/] Detailed analyses of election returns made by experts for both parties confirmed this pattern.[42/] The defendants' own expert described black support as the "kiss of death" for a white candidate.[43/] Appellants do not challenge this finding. Brief for Appellant, p. 13.

The district court also found that no black had ever won an at-large election in Mobile County for the school board, the city commission, the county commission, or the legislature, and that "it is highly unlikely that anytime in the forseeable future, under the at-large system, that a black can be elected against a white."[44/] The

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40/ A. 184a-191a, 229a, 240a, 243a, 256a, 261a, 272a-273a, 283a-284a, 285a-286a, 300a, 324a, 484a.

41/ A. 221a, 222a, 229a, 244a, 294a-295a, 297a, 301a, 302a, 305a, 320a, 364a-265a, 366a-368a, 411a, 417a, 418a, 492a, 498a-499a, 502a.

42/ A. 480a-484a, 488a, 504a-520a; P. Ex. 10-52.

43/ A. 492a.

44/ J.S. 10b, 12b, 13b, 40b; A. 12a, 14a, 15a, 37a.

court noted that four "well educated and highly respected" blacks had run for the Mobile school board, including two doctors, J.S. 10b, and a former president of the state P.T.A. A. 328a-30a. "They all received good support from the black voters and virtually no support from whites. They all lost to white opponents in runoff elections."J. S. 10b; A. 13a. Both black and white Mobile politicians, including the defendant school board president, testified that no black could be elected under the at-large system.[45/]

The district court further found that Alabama had a long history of officially practiced and advocated racial discrimination against potential black voters,[46/] precisely the sort of history likely to engender racial bloc voting by whites. The record fully supports this finding,[47/] and

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45/ A. 230a-231a, 231a-232a, 272a-273a, 308a-309a, 321a, 325a, 340a-341a, 355a, 359a-360a, 369a-370a, 378a. The testimony of defendant Alexander is quoted supra, p. 19. See also A. 406a-407a.

46/ J.S. 19b-21b, 43b; A. 20a-21a, 39a.

47/ A. 195a-203a, 207a-210a. That history is set out at length in the Brief for Appellees in City of Mobile v. Bolden, No. 77-1844, pp. 25-33.

appellants concede its correctness.[48/]

The district court also noted the existence of several election rules not essential to at-large elections that aggravated the dilutive effect of Mobile's at-large system. The system, like that in White v. Regester, includes majority runoff and numbered place requirements,[49/] which "enhanced the opportunity for racial discrimination" by precluding the election of a black based on a mere plurality. White v. Regester, 412 U.S. at 766. Also, as in White, there was no residence requirement, so that "all candidates may be selected from outside the Negro residential area". White v. Regester, 412 U.S. at 766 n.10. Appellants acknowledge the correctness of this finding.[50/]

The district court found that the "at-large county board members have not been responsive to the minorities' needs",[51/] as might have

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48/ Brief for Appellants, p. 49.

49/ J. S. 21b-22b, 44b-45b; A. 22a, 39a-40a.

50/ Brief for Appellants, pp. 44-45 n.21.

51/ J. S. 13b; A. 15a.

been expected where the election system effectively disenfranchises blacks. The court relied in particular on the school board's prolonged and obstinate refusal to dismantle its de jure segregated school system. Desegregation only occurred under court order after extended litigation, including 15 appeals, in Davis v. Board of School Commissioners of Mobile County.[52] The district court held:

> The lengthy record in Davis, supra, is devastating evidence of the complete unresponsiveness and resistance on the part of the Board to the particular needs and aspirations of the black communty.
>
> The record ... is replete with dilatory actions by the Board attempting to forestall implementation of a desegregated school system.... [T]he Board adamant[ly] refus[ed] to respond voluntarily to black community interests and the prevailing law of the land.[53]

The Board had refused to acknowledge that its concededly segregated system was unconstitutional, had withheld from the courts information necessary to resolve the litigation, and had con-

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52/ Civil Action No. 3003-63-H, S.D. Ala.

53/ J.S. 14b, A. 15a-16a.

sistently disobeyed federal court decrees.[54] On appeal of the instant action in 1977, the board defended its conduct between 1963 and 1970 with an apparent reliance on Plessy v. Ferguson, 167 U.S. 537 (1896); they urged that "the manner of operation declared unconstitutional was, until a particular decision of the Supreme Court, fully constitutional and supported by a prior line of decisions of the Court".[55]

The appellants challenge this finding of unresponsiveness, characterizing Davis as "unrelated litigation". Brief for Appellants, pp. 50-51. We submit there is no form of unresponsiveness more relevant to a case such as this than the refusal of an all-white school board to permit a black child, because of his or her race, to attend a de jure all-white school. In this case those school officials persisted in that intransigent behavior 15 years after Brown v. Board of Education, 347 U.S 483 (1954), and

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54/ J.S. 16b-18b; A. 16a-18a.

55/ Brief for Defendants-Appellants, No. 77-1583, 5th Cir., pp. 38-39.

aggravated it by the assignment of faculty on the basis of race. Appellants object that the last specific order in Davis cited by the district court was in 1970. Brief for Appellants, p. 51. This is correct but misleading. In 1972 the school board summarily expelled a large number of black high school students, and only agreed to reinstate them after being again sued in federal court.[56] When the instant case was tried in 1976, as the district court noted,[57] proceedings in Davis were still pending in the district court. Those proceedings resulted in a decision by Judge Hand in 1977 finding that the school board was still violating court-ordered and constitutional requirements in the hiring and assignment of faculty and staff, and ordering additional injunctive relief.[58] In 1978, after two blacks had

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56/ Cooley v. Board of School Commissioners of Mobile County, No. 7100-72 (S.D. Ala.).

57/ J. S. 18b; A. 19a.

58/ Davis v. Board of School Commissioners, No. 3003-63-H (S.D. Ala., Oct. 27, 1977). Representative Gary Cooper testified at trial in 1976 that he had received complaints of employment discrimination by the board. A. 264a, 265a-66a.

been elected to the Mobile school board from single-member districts, the outgoing white commissioners voted to require a four-to-one majority to alter any existing board policy, a rule which would have guaranteed that no change of policy could occur without the support of a majority of the remaining white members. The district court struck down this new requirement on the ground that it was "conceived to", "devised to and will function to encumber the attempts of new black Board members to place on the agenda and secure sufficient votes ... for passage of proposals prompted by and in the interests of their constituents."[59]

Even if the school board had after 1970 remained in compliance with outstanding federal court decrees, that would not have substantially attenuated the relevance of its earlier conduct. A 1970 decree had imposed on each board member personally a fine of $1,000 a day if the court decrees were not obeyed;[60] further resistance

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59/ Appendix to this brief, App. 13a, 14a.

60/ J.S. 16b; A. 17a.

was hardly likely in face of that drastic but necessary measure. Of the five whites who were school commissioners when this case went to trial, two, Sessions and Berger, had been commissioners in 1970. Appellants do not in this Court assert, and did not at trial prove, that either the nonresponsiveness of the board or the dilutive effect of the at-large system had diminished since 1970. The conduct of the defendants in connection with the Kennedy and Sonnier bills indicated that the old attitude toward blacks continued unabated.

Appellants urge that, even if blacks cannot elect a black to the school board, they have an opportunity to affect which white will be elected. The district judge properly did not credit the evidence offered by the defendant on this issue. A single defense witness testified that the overall winners in 19 of 27 contests since 1960 had also received a majority of the votes of the predominantly black wards. A. 389a. A detailed analysis of election returns revealed, however, that the black wards had never been the swing vote in any election; in every case the successful white candidate had a majority of the white vote, and would have won even if the losing candidate

had carried the black wards. A. 288a-290a, 540a.

Finally, appellants urge that there is a "longstanding and continuous commitment to the people of Mobile and the State of Alabama" to using at-large elections for the Mobile school board. Brief for Appellants, pp. 51-54. But the most recent legislative expression of preference on this issue was the adoption in 1975 of the Kennedy Act, which abolished at-large elections and mandated the use of single-member districts. While this case was pending in the district court, moreover, the members of the school board repeatedly announced their support of single-member districts.[61] The record reflects not the slightest public opposition to these proposals. Whatever tactical purposes these professed policies may have served in 1976, appellants cannot now disavow them.

The record in this case reveals the type of evidence found sufficient to establish a constitu-

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61/ A. 101a, 111a, 115a, 145a-46a, 168a, 177a-173a, 178a.

tional violation in White: racial bloc voting by whites that consistently defeats black and black-supported candidates, racial discrimination by the at-large white officials against their black constituents, a long history of official discrimination, and the existence of laws which aggravate the racial effect of the at-large system. That system is the functional equivalent of one in which whites reside in a district which has five school commissioners while blacks reside in a district which has none. The district court's finding of dilution represents "a blend of history and an intensely local appraisal of the design and impact of the [Mobile] multi-member district in the light of past and present reality, political and otherwise", 412 U.S. at 769-70, and should be upheld.

IV. THE AT-LARGE SYSTEM FOR ELECTING THE MOBILE SCHOOL BOARD VIOLATES THE FIFTEENTH AMENDMENT

The complaint in this action alleged that the at-large system for electing the Mobile school board violated the Fifteenth Amendment as well as the Fourteenth. A. 75a. The district court noted the existence of this claim, J.S. 2b,

but did not discuss it. Appellees maintain that the Fifteenth Amendment provides an alternative ground for affirmance.

In our brief in City of Mobile v. Bolden, we set out at length our contention that the Fifteenth Amendment prohibits not only election practices which are intended to discriminate on the basis of race, but also those which "inherently operat[e] discriminatorily". Lane v. Wilson, 307 U.S 268, 274 (1939). We there explain that the paramount purpose behind that Amendment was to guarantee to blacks an effective franchise by which they could protect themselves against governmental discrimination. Brief for Appellees, No. 77-1844, pp. 82-91. Judge Wisdom so construed the Fifteenth Amendment in a companion case below. Nevett v. Sides, 571 F.2d 209, 231-36 (5th Cir. 1978).

Appellants urge that several decisions of this Court hold that proof of discriminatory purpose is essential to establish a violation of the Fifteenth Amendment. Brief for Appellants, pp. 32-35. But the decisions cited by

appellants do not support their contention. Wright v. Rockefeller, 376 U.S. 52 (1964), emphasized the absence of evidence of either discriminatory purpose or discriminatory effect, noting that the plaintiffs had "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines." 376 U.S. at 46. Louisiana v. United States, 380 U.S. 145 (1965), struck down Louisiana's "interpretation test" under the Fifteenth Amendment not only because it was "part of a successful plan to deprive Louisiana Negroes of their right to vote", 380 U.S. at 152, but also because it was "completely devoid of standards and restraints". 380 U.S. at 153. Mr. Justice Stewart's opinion in United Jewish Organizations v. Carey, 430 U.S. 144, 179-80 (1970), does use the term "contrivance", but does not purport to be an exhaustive listing of the practices which violate the Fifteenth Amendment. The issue in UJO was whether the type of racial motivation involved was unconstitutional, and Justice Stewart's opinion purports to describe, not all the practices which the Amendment forbids, but only the types of motivation it prohibits. Each of these

cases indicates that discriminatory intent is sufficient to prove a violation of the Fifteenth Amendment, but none suggests it is necessary.

The election system in operation in Mobile utterly frustrates the purpose of the Fifteenth Amendment. In form blacks are able to mark and cast ballots, but in substance they are disenfranchised. They cannot elect any black to the school board. They cannot elect to the board any white known to support fair treatment for the black community. And they cannot protect themselves against policies of segregation and discrimination by the all-white board. Despite the Voting Rights Act, and although at least one out of four Mobile voters is black, Brown v. Board of Education could not be implemented by resort to the ballot, but required instead resort to the federal courts.

On repeated occasions this Court has insisted that a variety of grievances against state and local governments, many involving problems with a particular impact on racial minorities, should be resolved by elected public officials. The remitting of such issues to elected

officials requires, we suggest, consistent judicial vigilance to assure that the electoral system affords those minorities a realistically equal opportunity to advance their interests through the electoral process.

CONCLUSION

For the above reasons the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Counsel for Appellees

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
CIVIL ACTION
No. 75-298-P

LEILA G. BROWN, et al.,

Plaintifffs,

- v -

JOHN L. MOORE, et al.,

Defendants.

ORDER ON SELECTION OF SCHOOL BOARD CHAIRMAN AND ON PLAINTIFFS' MOTION TO ENJOIN NEW BOARD POLICIES, ETC.

The plaintiffs filed a motion to show cause why the defendants should not be held in contempt. In their motion the plaintiffs sought the following relief: (1) show cause contempt citations against the defendants School Board (Board) and its member commissioners for failure to elect a President or Chairman pursuant to this court's 1976 Opinion and Order. Brown v. Moore, 428 F.Supp. 1123, 1145 (S.D. Ala. 1976), aff'd. 575 F.2d 298 (5th Cir. 1978); (2) an injunction

against implementation of newly adopted internal policies of the Board; and (3) designation by the court of either Commissioner Drago or Commissioner Alexander as Chairman or President of the Board.

After a hearing on the matter of contempt this court issued an order on October 20, 1978 (amended on October 25) in which Commissioners Bosarge, Sessions and Alexander were found in contempt. Furthermore, the Board and its members were ordered to meet the following day and elect a Chairman or Presisent in conformity with this Court's original decree in this order. The Board failed to do so and applied to Justice Lewis F. Powell, Jr., of the United States Supreme Court for relief.

On October 27, 1978, Mr. Justice Powell issued an order staying both the November elections of the two new Board members and the civil contempt order pending the Supreme Court's decision on noting probable jurisdiction of the case. On October 30, 1978, the Supreme Court did note probable jurisdiction. 47 U.S.L.W. 3301 (October 30, 1978). The next day, Mr. Justice Powel vacated his October 27 stay order with regard to the November elections, maintained the stay of the contempt order and added:

> "With respect to the selection of Chairman of the School Board, the district court may take such other action not inconsistent with this order as it deems appropriate."

Moore v. Brown, 47 U.S.L.W. 3314 (October 31, 1978).

On November 14, 1978, a hearing was held for the purpose of selecting a Chairman of the Board pursuant to the Supreme Court order and of taking additional evidence on the plaintiffs' motion for injunctive relief with regard to the new Board policies.

November 15, 1978 was the date set for the newly elected Board members to take office. All members of the Board as it would be constituted November 15, 1978, were invited to be present. All appeared with the exception of Board member Bosarge who was hospitalized.

After asking the plaintiffs' and defendants' attorneys if there were any recommendations as to the procedure the court should employ in selecting a chairman, the court stated that over the next two years defendant Dan C. Alexander, Jr. should serve for a one year period in the capacity of non-voting Charirman and that defendant Ruth Drago

should serve for one year in the same capacity. The initial Chairman's term was to commence November 15, 1978, and the other term was to begin on the one-year anniversary School Board meeting date.

After this decision was announced, advice was sought from each of the new Board members as to their preference between the two, Drago and Alexander, as to who should serve the first term beginning November 15, 1978. Board members Alexander, Gilliard, Berger, and Drago each expressed a preference for defendant Alexander. Board member Cox abstained. The court took the advice of the majority of the Board and appointed Alexander as non-voting chairman to take office November 15, 1978, who would then be succeeded by Drage as non-voting chairman on the one-year anniversary meeting date of the School Board.

The two designated chairman, Alexander for the November, 1978 to November, 1979 period, and Drago for the November, 1979 to November, 1980 period, will not have a vote except as set out in this Court's original decree:

> "For this two year period of time only, 1978 to 1980, the Chairman will have the right to vote only in the event of a tie vote which could be occasioned by abstention, absence, or any other reason."

Brown v. Moore, supra at 1145-46.[1/]

If either of these two chairman during their respective terms of office are not present, or refuse to serve, or cannot serve for any reason, as Chairman, the regularly elected vice-chiarman will serve and have all voting rights, etc. that such Board member ordinarily has. Alexander and Drago during their respective terms as Chairman will not have the right to vote because of their not serving as chairman during their respective chairmanships.

After resolution of the Chairman selection issue, the court took additional evidence and heard arguments on the issue of injunctive relief. The plainiffs had amended their motion invoking All Writs Act, 28 U.S.C. §1651, as a basis for enjoining enforcement of the new Board policies.

1/ A tie vote means exactly that. It would necessarily have to be a 2-2 or a 2-2-1 vote. If three constitutes a quorum, there could be a 1-1 (if an abstention) or a 1-1-1 vote. Either would be considered a tie vote. The non-voting Chairman cannot use his presence to constitute a voting quorum or to constitute a quorum for any other purpose. A quorum would have to be constituted from the regular voting members. A 2-1-1-1 vote is not a tie vote.

The following findings of fact and conclusions of law are addressed to the question of the propriety of the new polices.

FINDINGS OF FACT

In the original opinion and order, as amended, in this action, the remedial measures prescribed by the court included the 1978 election of two Board Commissioners from two predominantly black areas, Districts 3 and 4. In compliance with this directive, primary elections were held for the two seats in September of this year. Two black citizens, Mr. Norman G. Cox and Dr. R. W. Gilliard, won their respective primary races for the Board and were elected without opposition in the general election of November 7, 1978. Eight days later they were sworn in as members of the Board.

On October 11, 1978, more than a month before the new black Board members took office, the Board adopted a new set of internal policies at its regular meeting [see minutes of meeting (Plaintiffs' Exhibit No. 2 from October 20, 1978 hearing) and new policies (file item No. 216, Attach-

ment B)] which supplanted the policies adopted in August of 1974 (see file item No. 216, Attachment A). A comparison by the court of the two sets of policies revealed substantive changes enhancing the position of President or Chairman and the relative power of Board members.

The powers of the non-voting Chairman (President) have been expanded to enhance his or her control over Board matters in the following ways:

(1) An override of the President's decisions on points of order now requires a two-thirds majority of the Board (i.e., four votes) whereas a simple majority (i.e.g, three votes) would suffice under the August 1974 policies (compare new and old policy §BBABA);

(2) Emergency Board meetings now may be held only upon the request of the President (new Board policy §BBB);

(3) The President is now an ex-officio member of all committees (compare old and new policy §BBC);

(4) The President possesses the power, with the approval of the Board, to appoint chairpersons of all advisory committees whereas the recommenda-

tion of the Superintendent was part of the procedure before (compare old and new policy §BBFA and BBFB);

(5) The President must approve all items to be placed on the written agenda of regular Board meetings (compare old and new policy §BCBD).

It is significant, too, that the necessary number of votes of Board members has been raised from three to four creating in the words of Alexander a "super" majority, with regard to the following actions:

(1) To call special meetings of the Board (compare old and new policy §BCAC);

(2) To override prior actions of the Board (compare old and new policy §BCB);

(3) To constitute a quorum (compare old and new policy §BCBFA);

Board President Dan C. Alexander, Jr., declared at a press conference and claimed in open court that a number of the policy changes adopted in October were designed to give continuity and stability to prior Board policy by circumventing the creation of a new 3-person majority on the board consisting of the two new black Board members and a present member of the

Board. Alexander said that this new majority would work to overturn previous actions and prior policy of the "old" Board.

The Board meeting of October 25, 1978, demonstrated how the powers of the President or Chairman to prevent a majority of Board members from prevailing on issues of importance. The Board had been uncussessful in its attempts to elect a non-voting Chairman and at the October 25 meeting one Board member announced his intention to break the deadlock by changing his vote to create the necessary three-person majority for Drago. (See minutes in Plaintiffs' Exhibit No. 1, pp. 50-64, offered at hearing on November 14, 1978). Chairman Alexander employed his authority to pass on points of order in deciding unanimous approval by the Board was essential to place the vote for non-voting Chairman on the agenda since it was not part of the written agenda for the meeting. With two votes against supplmenting the agenda with this m æterW Alexander refused to permit such a vote.

These actions stand in sharp contrast to the procedures employed by Alexander subsequent to this court's finding of him as well as Board

members Bosarge and Sessions in contempt on October 20, 1978, for failure to vote pursuant to this court's decree in this cause. Alexander, as Board Chairman, had no difficulty with the procedure to poll the Board and to permit himself to change his previous abstention to a vote for Drago. Niether did he have difficulty in allowing Bosarge and Sessions to vote again. Furthermore, the following day he had little trouble in conducting another vote and permitting Sessions to change his vote from Bosarge to Drago, one of the candidates for the position designated by the court.

In connection with the show cause contempt citation and the failure of the Board to elect a Chairman as ordered by the court, Chairman Alexander stated in substance that he was going to fight this court's order as long as he could. The various maneuvers, the encouragement to Bosarge with reference to Bosarge's failure to vote for either of the two designated persons, the attitude, the testimony, and the inconsistent positions of the defendants in the different Federal courts relating to the unexpired terms of the already elected Board members all serve

to substantiate the effort and purpose of the defendants to frustrate this court's order.

The defendants' position in this court was for the terms of all those then serving on the Board to be completed without restriction. The latest expiration date of any term member then serving on the Board will be November, 1982.

The reply brief of the defendants-appellants to the Fifth Circuit Court of Appeals, Case No. 77-1583, states:

> "It appears that Plainitffs' counsel expresses little concern over preserving the incumbencies of the individual defendants. Shortening the term of one commissioner, much less the terms of four commissioners, is 'fundamentally unfair', 'invidiously discriminatory' and 'violative of due process of law'. Such action is unconscionable and should not be considered in this case." (Emphasis added.)

Yet, in the defendants' application to the Supreme Court for stay of elections and stay of civil contempt sanctions, pending appeal to the Supreme Court of the United States, No. 78-357, at pp. 5 and 6, the defendants took an opposite position:

> "Indeed, a less intrusive, and far more practical remedy would have been simply to order in 1978 full elections of all 5 Commissioners by single-member district, thus giving all the County's voters, and not just its black voters, officials with the allegiance to a particular district's interest which the District Court apparently felt was essential to constitutionally sufficient representation. This would have avoided the enlargement of the Board from 5 to 6 members from 1978-1980, and the problems attendant to creating an amalgam Board of single-member and at-large Commissioners during this period." (Emphasis added.)

These inconsistent positions of the defendants in the Federal court system in this case, and the position of certain Board members in attempting to frustrate the single-member district plan ordered which included in its implementation a non-voting chairman, (so that none of the then elected Board members' term would be shortened) reflects a pattern of conduct of these defendants condemned by this court concerning the defendants' different positions on legislative proposals to provide for single-member district of the Board. (See, p. 21 of this court's original order beginning "On September 2, 1976, . . ." and ending on page 23 at "II".) In short, it is obvious that the basic thrust of these actions by the defendant Board, and certain of its members,

have been to delay or defeat their alleged support of the legislative actions and this court's orders of the single-member district election plans for the Board designed to remove the unconstitutional dilution of the black votes.

The core and thrust of this court's rulings in this litigation has been to remedy the unconstitutional dilution of the black vote in Mobile County in the election of Board members and the resulting Board policies that flow from this impermissible dilution. It is the finding of this court that the policy changes adopted by the Board in October of this year were devised to and will function to encumber the attempts of new black Board members to place on the agenda and secure sufficient votes, according to voting procedures at the time of this court's original order, for passage of proposals promoted by and in the interest of their constituents. This revisionary action by the Board represents a continuation of the unconstitutional voter dilution this court sought to remedy in its decree that is now almost two years old. Additionally, the court finds the enchanced powers of the non-voting President or Chairman will work to stave off Board members'

efforts to obtain adoption of programs and policies to which the President has objections.

In sum, it is the finding of this court that the Board's policy changes of late were conceived to and operate to impede, interfere and obstruct the injunctive remedy of this court's 1976 opinion and order whose purpose was to guarantee black citizens of Mobile County, through the ballot box, imput into the decision-making process of the School Board.

CONCLUSIONS OF LAW

The All Writs Act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a). Last year the Supreme Court construed its statutory provision and declared: "This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained. . . ." United States v. New York Telephone Co., 434 U.S. 159,

____, 98 S. Ct. 1364, 54 L.Ed.2d 376, 389 (1977). Courts within the Fifth Circuit have stated similar positions on the operation of this judgment enforcement tool of the federal judiciary. Teas v. Twentieth Century Fox Film Corp., 413 F.2d 1263, 1267 (5th Cir. 1969), citing with approval United States v. Wallace, 218 F.Supp. 290, 292 (N.D. Ala. 1963); see also ITT Community Development Corp. v. Barton, 569 F.2d 1351, 1358-60 (5th Cir. 1978).

The All Writs Act is applicable in the factual context of the case sub judice in that "[s]ection 1651 gives the district court power to enjoin action that improperly hinders or defeats the jurisdiction which it is validly exercising." 9 Moore Federal Practice ¶110.29, pp. 316-17. There can be no doubt that the conduct of the School Board as detailed above meets this criterion for the utilization of the All Writs Act in the form of injunctive relief.

It has been suggested that the Board as re-constituted might seek to dismiss the pending appeal in this cause now in the Supreme Court. This court is of the opinion that it would be inequitable and unfair to permit a Board restructured by an order of this court to dismiss the

appeal and deny those ruled against the opportunity of testing the legality of that order.[2/]

It is therefore ORDERED, ADJUDGED and DECREED that the defendant Board of School Commissioners of Mobile County and the defendant School Commissioners are now constituted (Mr. Dan C. Alexander, Jr., Dr. Norman J. Berger, Mr. Hiram C. Bosarge, Mr. Norman G. Cox, Mrs. Ruth F. Drago, and Dr. R.W. Gilliard), individually and in their official capacity, their officres, agents, successors and those acting in concert with them, are thereby ENJOINED:

From implementing, enforcing or relying upon any new School Board policies which operates to;

(1) enhance the powers of the Board Chairman or President beyond those invested in said

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2/ The "real" and "basic" issues in this case, dilution of the black vote and remedy ordered, single-member districts, and the implementation of that order are already before the Supreme Court. The court herein enjoins this newly constituted Board from dismissing that appeal. On the other hand, the newly constituted Board must be permitted in all other respects to exercise all its perogatives, including appeal or not of this order, until such time as the Supreme Court of the United States rules otherwise in the case before it.

officer on January 18, 1977, and especially the following new School Board policies, to wit;

(a) A two-thirds majority (i.e., four votes) will be required to override the President's decisions on all points of order;

(b) Emergency Board meetings may be convened only on the approval of the President;

(c) For the first time, the Policies designate the President an ex-officio member of all Board standing committee;

(d) The President, with the approval of the Board, is empowered to appoint the Chairman of all advisory committees, whereas previously the recommendation of the Superintendent was also required;

(e) The President, for the first time, must approve all items to be placed on the written agenda or regular Board meetings, and

(2) raise the number of Board members' votes required as of January 18, 1977, to constitute a quorum or authorize any steps taken or procedure adopted by the Baord, and especially the following new School Board policies, to wit,

(a) To call special meetings of the Board;

(b) To override any prior actions of the Board; and

(c) To constitute a quorum of the Board.

It is further ORDERED, ADJUDGED and DECREED that pursuant to Mr. Justice Powell's order of October 31, 1978, it is ORDERED that defendant Dan C. Alexander, Jr. shall serve as non-voting Chiarman of the Board for one year, and that Ruth Drago shall serve in the same capacity for one year. Dan C. Alexander, Jr. is to serve as non-voting Chiarman commencing November 15, 1978, and defendant Ruth Drago shall serve as non-voting Chairman commencing on the one-year anniversary meeting date of the Board.

It is furthered ORDERED, ADJUDGED and DECREED that this court, upon its own motion, enjoins the present members of the Board, as set out above, and their successors in office individually and collectively, and all persons acting in concert with them from dismissing the appeal and petitions previously filed in this action in the Supreme Court of the United States. The present Board is free by majority vote to choose whether to appeal

or not to appeal, directly, by ancillary action, or otherwise, this or any other ruling by this court hereafter in this matter.

All costs are taxed to the defendants.

Done this the 24th day of November, 1978.

Virgil Pittman /s/
UNITED STATES DISTRICT JUDGE

U. S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
_____ DAY OF NOVEMBER 1978
MINUTE ENTRY NO. _____
WILLIAM J. O'CONNOR, CLERK
BY-

Deputy Clerk